

AMENDED IN ASSEMBLY APRIL 26, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1700

Introduced by Assembly Member Pavley

(Principal coauthor: Senator Escutia)

**(~~Coauthor: Assembly Member Berg~~ Coauthors: Assembly
Members Berg and Koretz)**

(Coauthor: Senator Kuehl)

February 22, 2005

An act to add Section 188 to the Code of Civil Procedure, relating to secrecy agreements.

LEGISLATIVE COUNSEL'S DIGEST

AB 1700, as amended, Pavley. Secrecy agreements: public dangers.

Existing law specifies that certain types of information are confidential or subject to privilege, and may not be introduced as evidence in a court action. Existing law also allows the parties to a civil action to settle their dispute under whatever terms they agree upon.

This bill would provide that in an action based upon the existence of a public danger, as defined, evidence of or information concerning a public danger that was discovered during the course of litigation, whether or not that evidence or information was filed with the court, ~~shall be presumed to be public information and~~ may not be kept secret pursuant to agreement of the parties or by court order, except as specified. However, the bill would provide that this information may be kept secret for a period that the court deems appropriate only pursuant to a court order based upon the court's independent findings, as specified.

The bill would further provide that unless the information is protected from disclosure by court order pursuant to the bill, in an action based upon a public danger, any agreement or contract or portion of an agreement or contract that restricts a party from disclosing information relating to the public danger is void as contrary to public policy, and may not be enforced. The bill would also specify that the court may require the ~~requesting~~ party *requesting the order* to provide an identifying log or other document. The bill would prohibit an attorney from selling or offering for sale any information obtained through discovery to any member of the State Bar or to any other person in violation of the prohibitions on attorney solicitation, fee splitting, or financial arrangements among lawyers or nonlawyers, as specified, and provide that a violation of those provisions shall be a basis for professional discipline by the State Bar. The bill would also set forth various findings and declarations by the Legislature.

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~-no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:
3 (a) Secrecy agreements *and protective orders not reviewed by*
4 *a court* that prohibit disclosure to the public or public safety
5 agencies of information relating to public dangers that cause
6 *significant or* substantial bodily injury or death are injurious to
7 the health, safety, and well-being of all Californians.
8 (b) Secrecy agreements can have tragic consequences. A
9 widely known example of the disastrous consequences of secrecy
10 agreements is the tragedy resulting from dangerous defects in
11 Firestone tires, which have reportedly caused more than 150
12 deaths and more than 500 injuries worldwide. For many years,
13 Bridgestone/Firestone, Inc. knew about these dangerous defects,
14 but kept the information out of the public eye by secretly settling
15 many lawsuits brought as a result of crashes related to defective
16 tires. During that time, the public continued to drive on Firestone
17 tires, unaware of the mortal danger to their families and
18 themselves. As a result of these hidden, dangerous defects, on
19 August 9, 2000, Bridgestone/Firestone, Inc. and Ford Motor Co.
20 jointly announced that Firestone would recall over 14 million

1 tires. In the absence of a secrecy agreement, information about
2 this dangerous product could have been disclosed publicly, which
3 could have saved lives and avoided injuries. However, the
4 companies demanded secrecy as the price of compensation for
5 victims, resulting in many deaths and injuries that could have
6 been avoided absent demands for secrecy agreements.

7 (c) Secrecy agreements can allow companies to shield
8 information from public view and can permit these companies to
9 continue illegal practices without accountability.

10 Similar circumstances allowed the secret closing of over 200
11 General Motors side impact gas tank fire cases. A federal district
12 court in Montana discovered that a total of approximately five
13 hundred million (\$500,000,000) was paid to plaintiffs in those
14 cases. The recent removal from the market of the drug Vioxx and
15 recent public disclosures of the dangers of suicide in children
16 who use antidepressants raise serious questions about prior
17 efforts to keep such information from the public. Recent
18 disclosures show that ~~priests~~ clergy in some parts of the country
19 who had molested children were able to move and continue to
20 live in proximity to other children because claims against them
21 were settled secretly.

22 (d) Secrecy agreements allow companies to shield
23 life-threatening dangers and harmful practices from public view,
24 thereby severely jeopardizing public welfare and safety. It is
25 against the public interest to allow secrecy agreements to keep
26 information regarding public dangers to remain secret, except in
27 very limited circumstances upon careful independent judicial
28 oversight and review.

29 *(e) There are important public policy reasons for placing*
30 *decisions about information disclosure in the hands of the trial*
31 *court rather than the parties, once litigation has commenced. The*
32 *trial court is in the best position to weigh fairly the competing*
33 *needs and interests of parties affected by discovery and to*
34 *consider the public interest. Because the judicial process is*
35 *frequently the avenue by which the public and regulatory*
36 *agencies learn of significant health and safety hazards, allowing*
37 *enforcement of private secrecy agreements and stipulated*
38 *protective orders without court review may prove detrimental to*
39 *the public well-being.*

SEC. 2. Section 188 is added to the Code of Civil Procedure, to read:

188. (a) It is the intent of the Legislature to better protect Californians from death or substantial injury caused by any public danger, including, but not limited to, defective products, environmental hazards, and individuals who physically harm, abuse, or molest others, by creating a presumption against secrecy for settlement agreements and “confidentiality” agreements, whether or not filed with the court, and to protect the openness of information acquired through discovery.

(b) Notwithstanding any other provision of law, in an action based upon the existence of a public danger, evidence of or information concerning a public danger that was discovered during the course of litigation, whether or not that evidence or information was filed with the court, ~~shall be presumed to be public information and~~ may not be kept secret pursuant to agreement of the parties or by court order, except as provided in this section. This information may be kept secret for a period that the court deems appropriate only pursuant to a court order based upon the court’s independent finding that either of the following ~~exist~~ exists:

(1) The information is a trade secret or otherwise privileged under existing law, *and the order is narrowly tailored to apply only to that information necessary to protect the trade secret or privileged information.*

(2) All of the following are present:

(A) An overriding interest exists that overcomes the ~~right of public access to~~ *public interest in disclosure of* the information.

(B) The overriding interest supports keeping the information secret.

(C) A substantial probability exists that the overriding interest will be prejudiced if the information is not kept secret.

(D) The proposed secrecy is narrowly tailored to protect the secrecy only of that information for which an overriding interest exists.

(E) No less restrictive means exist to achieve the overriding interest.

(c) Unless the information is protected from disclosure by court order pursuant to subdivision (b), in an action based upon a public danger, any agreement or contract or portion of an

1 agreement or contract that restricts a party from disclosing
2 information relating to the public danger is void as contrary to
3 public policy, and may not be enforced.

4 ~~(d) In order to implement this section determining whether~~
5 ~~and to what extent to grant an order under subdivision (b), the~~
6 court may require the ~~requesting~~ party requesting the order to
7 provide an identifying log or other document.

8 (e) *This section does not apply to or affect any of the*
9 *following:*

10 (1) *The ability of the parties to enter into a settlement*
11 *agreement or stipulated agreement that requires the*
12 *nondisclosure of the amount of any money paid in a settlement of*
13 *a claim.*

14 (2) *Except for the agreement itself, which is governed by*
15 *subdivisions (b) and (c) of this section, the confidentiality of*
16 *preagreement communications, negotiations, or settlement*
17 *discussions between mediation participants pursuant to Chapter*
18 *2 (commencing with Section 1115) of Division 9 of the Evidence*
19 *Code, or the confidentiality of evidence protected by Section*
20 *1153.5 or 1154 of the Evidence Code.*

21 (3) *Actions for professional negligence against a health care*
22 *provider.*

23 (4) *Actions for breach of contract or any other business injury*
24 *brought by a business entity against another business entity.*

25 (f) *As used in this section:*

26 (1) "Public danger" means an instrumentality, including, but
27 not limited to, any device, instrument, *substance*, person, entity,
28 procedure, or product, or a condition of a device, instrument,
29 *substance*, person, entity, procedure, or product, that has caused
30 and is likely to further cause *significant or* substantial bodily
31 injury or death. ~~"Substantial bodily injury" includes substantial~~
32 ~~psychological trauma directly caused by behavior or conduct.~~
33 *"Significant or substantial bodily injury" includes significant or*
34 *substantial psychological trauma resulting from any act of sexual*
35 *molestation or abuse, or repetitive acts of abuse or neglect*
36 *against a child, elder, or dependent adult.*

37 (2) A court's "independent finding" under subdivision (b)
38 means that the court has made an independent determination
39 based on a review of the law as it applies to the facts and not

1 based in whole or part on a stipulation of the parties to keep
2 information secret.

3 (3) “Overriding interest” under subparagraph (A) of paragraph
4 (2) of subdivision (b) may include, but is not necessarily limited
5 to, concealing the identity of certain victims of harm, including
6 personal information about children and the victims of abuse, and
7 concealing *or redacting* certain confidential business information
8 relating to such matters as the personal addresses of corporate
9 officers or board members.

10 ~~(f)~~

11 (g) An attorney shall not sell or offer for sale any information
12 obtained through discovery to any member of the State Bar or to
13 any other person in violation of the prohibitions on attorney
14 solicitation, fee splitting, or financial arrangements among
15 lawyers or nonlawyers included in Rules 1-320, 1-400, and 2-200
16 of the Rules of Professional Conduct adopted by the Supreme
17 Court. Violation of this paragraph shall be a basis for
18 professional discipline by the State Bar. This section does not
19 alter or mitigate any existing rule or provision that may also be
20 applicable to the conduct.